

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE COMMISSIONER OF VETERANS AFFAIRS

Ted I. McKinney,
Petitioner,
vs.

**RECOMMENDATION ON
RESPONDENT'S MOTION FOR
SUMMARY DISPOSITION**

Minnesota State Community and
Technical College at Moorhead,
Respondent.

The above-entitled matter is before Administrative Law Judge Steve Mihalchick on the Motion for Summary Disposition of Respondent filed on June 7, 2004. On June 14, 2004, a telephone conference was held to discuss the motion. Petitioner was allowed to thereafter submit a written response to the motion. The record closed on July 9, 2004, upon receipt of correspondence from Petitioner.

Marsha Eldot Devine, Assistant Attorney General, Suite 1100, 445 Minnesota Street, St. Paul, MN 55101-2128, appeared for Respondent. Ted I. McKinney (Petitioner), 900 Homestead Court, West Fargo, ND 58078, appeared for himself without counsel.

Based upon all the files, records, and proceedings herein, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that the Commissioner of Veterans Affairs, issue the following order:

Respondent's Motion for Summary Disposition is **GRANTED** as follows and Petitioner's petition is **DISMISSED** without prejudice to any other claim Petitioner may have.

Dated this 29th day of July, 2004.

s/Steve M. Mihalchick
STEVE M. MIHALCHICK
Administrative Law Judge

NOTICE

This report is a recommendation, not a final decision. The Commissioner of Veterans Affairs will make the final decision after a review of the record. The Commissioner may adopt, reject, or modify the Recommendation and Memorandum contained in this Report. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Clinton Bucher, Department of Veterans Affairs, Room 206C, 20 West 12th Street, St Paul, MN 55155-2079, 651-284-3408, to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

Factual Background

Minnesota State Community and Technical College (MSCTC) is a multi-campus community and technical college that is part of the Minnesota State Colleges and Universities (MnSCU) system. The MSCTC campus at Detroit Lakes offers a variety of two-year educational programs that lead to certificates, diplomas, and associate degrees, and to transfers to four-year colleges.

Petitioner was honorably discharged from the United States Air Force in February, 1992.

On August 23, 1999, MSCTC – Moorhead hired Petitioner as a part-time adjunct faculty member to teach computer-related subjects on the campus. Petitioner resigned from that position on August 11, 2001. On August 16, 2001, MSCTC – Detroit Lakes hired Petitioner as a probationary full-time faculty member providing Computer Distance education to its students via the internet.

Every two years the Minnesota State College Faculty Bargaining Unit 10 enters into an employment contract with the MnSCU Board of Trustees. This contract, the Minnesota State College Faculty Collective Bargaining Agreement (MSCF-CBA), requires all probationary full-time faculty members to successfully complete six

semesters of probationary status before becoming eligible for consideration as an unlimited full-time faculty member.^[1] The MSCF-CBA further requires that any probationary faculty member who is non-renewed be given notice of the non-renewal at least one month prior to the end of the sixth probationary semester. Such individuals are not entitled to the grievance procedures set forth in the collective bargaining agreement. Petitioner was bound by this contract while employed at MSCTC - Detroit Lakes.

On March 9, 2004, Petitioner received a letter from the Provost of MSCTC – Detroit Lakes notifying him that his appointment as a full-time probationary faculty member would not be renewed, effective May 14, 2004.^[2] The letter informed Petitioner that he was without recourse to the MSCF-CBA grievance procedures,^[3] as noted in the contract.

By letter to the President of MSCTC dated April 13, 2004, Petitioner requested that the non-renewal of his position be rescinded.^[4] The president responded by letter dated April 26, 2004, in which he acknowledged Petitioner's request and the difficulty of making such decisions.^[5]

On May 3, 2004, Petitioner filed a Petition with the Commissioner of Veterans Affairs pursuant to Minn. Stat. § 197.481, alleging that Respondent denied him his rights under the Veterans Preference Act by terminating him without a hearing under Minn. Stat. §197.46. The Department of Veterans Affairs served a Notice of Petition and Order for Hearing on May 20, 2004, setting the hearing to take place on July 8, 2004.

Respondent filed a Notice of Motion and Motion for Summary Disposition on June 7, 2004. On July 9, 2004, the Administrative Law Judge received a letter from Petitioner in which he acknowledged that his case was not appropriately before the Administrative Law Judge and seeking dismissal without prejudice.

Summary Disposition Standard

Summary disposition is the administrative equivalent of summary judgment. Summary disposition is appropriate where there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law.^[6] The Office of Administrative Hearings has generally followed the summary judgment standards developed in judicial courts in considering motions for summary disposition of contested case matters.^[7]

The moving party has the initial burden of showing the absence of a genuine issue concerning any material fact. A genuine issue is one that is not sham or frivolous. The resolution of a material fact will affect the result or outcome of the case.^[8] To successfully resist a motion for summary judgment, the nonmoving party must show that there are specific facts in dispute that have a bearing on the outcome of the case.^[9] When considering a motion for summary judgment, the facts must be viewed in the light most favorable to the non-moving party,^[10] and all doubts and factual inferences must be resolved against the moving party.^[11] If reasonable minds could

differ as to the import of the evidence, judgment as a matter of law should not be granted.^[12]

Legal Background

The Veterans Preference Act gives honorably discharged veterans preference in matters of public employment. It requires the state and local government to award additional points to veterans in the hiring process, and affords veterans **employed by local governments** protection from removal from their positions without a hearing.^[13]

Minn. Stat. § 197.455 specifically states that Minn. Stat. § 197.46, the removal provision, does not apply to state civil service. A state civil service employee is a person currently employed in a position, either classified or unclassified, in the legislative, judicial or executive branches of state government.^[14]

Discussion

According to Minn. Stat. §§ 43A.07 and 43A.08, unclassified positions include teachers in the MnSCU system. Such employees are members of the “state college instructional bargaining unit.”^[15] Thus, Petitioner is a state employee. As such, the removal provisions of Minn. Stat. § 197.46 do not apply to him. His petition for relief under that part of the Veterans Preference Act must be dismissed.

S.M.M.

^[1] Erickson Affidavit, Exhibit A.

^[2] Erickson Aff., Ex. C.

^[3] Erickson Aff., Ex. B.

^[4] Erickson Aff., Ex. D.

^[5] Erickson Aff., Ex. E.

^[6] *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1995); *Louwgie v. Witco Chemical Corp.*, 378 N.W.2d 63, 66 (Minn. Ct. App. 1985); Minn. Rules, 1400.5500K; Minn.R.Civ.P. 56.03.

^[7] See Minn. Rules 1400.6600 (1998).

^[8] *Illinois Farmers Insurance Co. v. Tapemark Co.*, 273 N.W.2d 630, 634 (Minn. 1978); *Highland Chateau v. Minnesota Department of Public Welfare*, 356 N.W.2d 804, 808 (Minn. App. 1984).

^[9] *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988); *Hunt v. IBM Mid America Employees Federal*, 384 N.W.2d 853, 855 (Minn. 1986).

^[10] *Ostendorf v. Kenyon*, 347 N.W.2d 834 (Minn. App. 1984).

^[11] See, e.g., *Celotex*, 477 U.S. at 325; *Thompson v. Campbell*, 845 F.Supp. 665, 672 (D.Minn. 1994); *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988); *Greaton v. Enich*, 185 N.W.2d 876, 878 (Minn. 1971).

^[12] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-251 (1986).

^[13] Minn. Stat. § 197.46.

^[14] Minn. Stat. § 43A.02, subds. 10 and 21.

^[15] Minn. Stat. § 179A.10, subd. 2 (10) (2002).